No. 11,554

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. R. MASON,

Appellant,

vs.

MINERAL INDUSTRIES DISTRICT,

Appellee.

BRIEF FOR APPELLANT.

J. R. MASON,
1077 Leavenworth Street, San Francisco,
Appellant Pro Se.

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STATEMENT REGARDING JURISDICTION.

The District Court.

This action was commenced by the filing of a petition by Merced Irrigation District, on July 23, 1946. (R. 30 to 40.)

The action was at law in respect of $32,811.95 in the custody of the District Court.

Appellee bases this case "upon statutory and substantive rules of (State) law", and insists that "the court can not exercise discretion in the premises but can only apply the law as it exists." (R. 55.) There was no dispute between the parties that State law and decisions govern and control the crucial point in this action.

Appellant objected to jurisdiction by the District Court, and requested "that this Honorable Court leave to the Courts of California the matter of fixing the rights of the parties". (R. 43.)

The District Court denied the petition of the district in its minute order of November 15, 1946. (R. 57.) This order was not signed, because objections were filed by appellant to certain discriminatory provisions in the proposed order and decree. (R. 59.) The minute order of November 15 was reversed and the petition was allowed by the District Court December 31, 1946. (R. 76.) Notice of appeal was filed January 22, 1947. (R. 84.) With bond for costs on appeal. (R. 84.)

The jurisdiction of this Court to entertain said appeal is the following. Judicial Code, Section 225, Title 28, sub. (a). Sections 24 and 25 of the Bankruptcy Act of 1898, as amended June 22, 1938. (11 *U.S.C.* Sections 47-48.)

Appellant, who owns and holds certain original bond obligations issued by Merced Irrigation District, is a creditor whose claim was duly filed, and whose bonds are among the "still outstanding obligations" expressly recognized as such in the final decree of July 15, 1941. (R. 26.)

STATEMENT OF THE CASE.

In this brief Merced Irrigation District will be referred to as the "appellee" and the appellant who was respondent below will be referred to as "appellant".

Appellee is a political subdivision of the State within the meaning of 26 U.S.C.A. § 1065(b). (72 Op. Atty. Gen. 38, February 4, 1937.) It has had confided to it the sovereign power of the State of California to levy unlimited direct annual ad-valorem assessments on land, and the duty to enforce their collection according to law, and to administer all tax revested land within its boundaries, whether by resale or lease, as a public trust the land itself being dedicated to the uses and purposes of the Act, among which purposes is the payment of all lawful obligations. The powers, rights and duties arising under this venerable State law (Stat. 1897, p. 254 as amended; now codified as Stat. 1943, Ch. 368, Div. 10 and 11) have been fully construed by this Honorable Court, by the Supreme Court of the United States, and the California Courts. This State law is not alone a statute authorizing the financing of wealth creating public works, but it is also a land reform law designed to curb the opportunity for land speculation, and to protect the common good.

Appellee issued and sold two bond issues dated January 1, 1922, and May 1, 1924, due serially 1934 to 1964 without option of prior payment, bearing interest at 5½% and 6% payable semi-annually which bonds it paid punctually until January 1, 1933. Since that date it has continuously violated the laws governing its trust obligation to appellant.

The first serious effort by appellee to repudiate its obligation to lay and collect the taxes required by law was disallowed by this Honorable Court, as re-

ported in 89 Fed. (2d) 1002. Certiorari was denied October 11, 1937, 58 S. Ct. 30.

The second action to bludgeon bondholders into accepting the compromise settlement it had failed to enforce the first time, was begun by the filing of a petition June 17, 1938 whereupon appellant filed his claim and set up his defenses. The final decree, dated July 15, 1941, on becoming final terminated the jurisdiction allowed by the provisions of 11 U.S.C.A. 401-403 the base of that proceeding. No jurisdiction over the debtor or the creditors or their bonds or other claims is authorized under 11 U.S.C.A. 401-403, unless they voluntarily have consented to jurisdiction. Appellant has at no time consented to bankruptcy jurisdiction over the bonds held by him, and does not now. Appellant's bonds, with certain others, were separately recognized and designated by the final decree of July 15, 1941 as "still outstanding obligations". (R. 27.) They are still legal for the investment of trust funds and savings banks under the laws of California, evidenced by the State Controller's certificate affixed to each bond. (R. 175.) The law authorizing this State certification is still in full force and effect. (Sec. 20000-83, Ch. 368, Stat. 1943.)

Appellee has shown no lawful right, title or interest in or to the $32,811.95 now in *custodia legis,* but given to it by the District Court on December 31, 1946, without warrant of law. The funds deposited in *custodia legis* created a trust fund subject to the final decree of July 15, 1941, and Title 28 of the Judicial Code, Secs. 851-852. Under no circumstances can they

be disbursed except as provided in the final decree, which became final November 9, 1942, unless and until the claims upon that fund have become disposed of, so that valid claims to the fund no longer exist.

Appellant owns 17 bonds of Merced Irrigation District of $1,000 denomination, bearing 5½% and 6% interest coupons which the District ever since 1933 has unlawfully failed, refused and neglected to pay in whole or in part. These bonds bear fixed maturity dates, and none are redeemable or callable prior to their due dates. 14 of the bonds are not lawfully due, their fixed maturity dates being 1952 to 1961.

It is stipulated (R. 101) that the transcript of record on appeal in case No. 9242 and case No. 9955 in this Court shall be a part of the record on appeal herein, but need not be reprinted. The form of the bonds owned by appellant is shown. (R. 13, case No. 9242.)

THE ISSUE OF THIS APPEAL.

From the foregoing statement it is apparent that the main issue presented in this appeal is a simple one.

It may be stated as follows:

Did the District Court err in ruling that the still outstanding obligations owned by appellant are outlawed by an applicable statute of limitations?

If so, is the order giving the $32,811.95 in *custodia legis* to the bankrupt after 45 days, unless sooner all claimed and withdrawn, an allowable modification of the final decree?

SPECIFICATION OF ERRORS AND POINTS ON APPEAL.

While this appeal presents but one main issue, the designation of points on appeal (R. 88) lists 12 points, the following will be relied on as constituting errors by the District Court in making the order from which this appeal is taken. These points are as follows:

1. The District Court erred in ruling that any of the bonds or coupons owned by J. R. Mason are outlawed, because some are not yet lawfully due or payable, and because those which are past due were all duly presented for payment, and are thus brought under the provisions of Sec. 52 of the Irrigation District Act, and are not subject to the statute of limitations otherwise applicable to past due claims.

2. The District Court, after the final decree had become final, is not authorized in proceedings under 11 U.S.C.A. 401-403 to make any additions to its substantive provisions, and was without jurisdiction as a court of bankruptcy to enter the order and decree of December 31, 1946 unless the statute of limitations applicable to the still outstanding bonds and coupons held by J. R. Mason had run, as a matter of law.

3. The doctrine of laches is inapplicable in the absence of any showing of injury. No such showing appears in the record.

4. The District Court erred in ordering the funds originally placed in the registry of the court to pay "the holders of such bonds in accordance with said Interlocutory Decree", given to the bankrupt unless withdrawn by the holders of still outstanding bonds within 45 days. No showing was made that the bankrupt has any

right, title or interest in or to any of this fund, the disbursement of which is governed by the provisions in Title 28 of the Judicial Code, Sections 851-852. No time limitation is provided in these sections of the Judicial Code within which lawful claims may be presented and paid.

5. The District Court erred in entering the order, because it has the force and effect of unlawfully giving abatement from mandatory taxation to private holders of land titles, and of allowing them to retain the land titles in violation of State law and decisions of the highest State Court, and of the Supreme Court of the United States. The effect of the decree is to enable tax evading and tax avoiding holders of land to unlawfully reap unearned increment, at the expense of the holders of "still outstanding" bonds, and with no benefit to the common good.

6. The District Court erred in failing to lift the restraints in the final decree, as requested, which restraint has the force and effect of permitting public tax officials of California to violate the Constitution and laws of California applicable under Deering's General Laws, Act 3854, p. 1792 (Stat. 1897, p. 254 as amended), in that it operates to release them from the performance of statutory taxing duties, as construed by the highest State Court, and also by the Supreme Court of the United States.

7. Appellant is a holder of valid, binding and unpaid original "still outstanding" bonds and coupons issued by Merced Irrigation District, whose vested rights as a bondholder are governed by State law and decisions, and are secured against impairment by Art. I, Sec. 10, cl. 1, and

the 5th and 14th Amendments to the United States Constitution; and also by Art. I, Sec. 16; Art. VI, Sec. 13; Art. IV, Sec. 25, sub. 16 of the California Constitution.

ARGUMENT.

1. THE DISTRICT COURT ERRED IN RULING THAT THE BONDS AND COUPONS OWNED BY APPELLANT ARE OUTLAWED.

There was no dispute between the parties in the District Court that State law and decisions control this case, there being no Federal statute of limitation "applicable to the still outstanding obligations".

In a letter addressed to the District Court November 12, 1946 (R. 55) appellee contended,

> "It is our position that the court is now without jurisdiction to allow Mr. Mason to take the money if he now desires to do so. If the statute of limitations has run as we contend, the court would seem to have no jurisdiction except to order the money returned to the Irrigation District. General equity authority would not seem sufficient to override a substantive rule of law. Once an appropriate statute of limitations has run the obligation to pay the money (if any exists) is extinguished.
>
> It is true that in the final decree the court said in effect that upon the expiration of the statute of limitation period the District might report back to the court for such action as the court deemed advisable. However, we do not make our case upon that order but upon statutory and sub-

> stantive rules of law by virtue of which we claim that the court can not exercise discretion in the premises but can only apply the law as it exists."

At no stage of the case did appellee show the statute of limitations which he relied on, or cite any Court decision construing such statute as being "applicable to the still outstanding obligations" such as are here involved.

Neither did he attempt to deny that the judgment of the Supreme Court of California in the case of *Moody v. Provident I. D.,* 12 Cal. (2d) 389, that the statute is inapplicable is decisive of the statutory and substantive rule of law governing this point. After considering the brief filed by appellant (R. 43) and exhaustive oral argument presented at the November 15 hearing (R. 105-157) the District Court thereupon ordered that the petition must be denied. (R. 57.) No law or decision was shown anywhere in the record (R. 157-199) supporting the reversal in the District Court order of December 31, 1946 which decrees:

> "That all outstanding bonds and coupons of the above named debtor effected by the plan of composition herein, and all claims of whatsoever nature based thereon, are now barred by the statute of limitations applicable thereto, and do not now constitute valid claims against said debtor * * *"

The 63 still outstanding bonds, of which appellant owns only 17 are fixed maturity bonds, 53 of which are not even lawfully due. The bonds are not redeem-

able or callable before their fixed due dates, and it is not disputed that the 3 past due bonds, and all past due coupons owned by appellant are valid and were duly presented according to the provisions of Sec. 52 of the Irrigation Act, which brings them under the substantive and statutory rule of law as construed and applied in the case of *Moody v. Provident I. D.* (supra), making the statute of limitations wholly inapplicable to any of the "still outstanding" bonds or coupons owned by appellant. In that case the Supreme Court of California settled that the presentation of bonds and coupons based on the same State laws as the bonds owned by appellant:

> "constituted a new agreement between the plaintiff and the district, under which the plaintiff's bonds and coupons would be exempt from the running of the statute of limitations until money sufficient to make payment thereof had come into the hands of the treasurer and notice given that money was available for the payment of the bonds. * * *
>
> It is settled law that an irrigation district is a governmental agency, and that it has such powers, and is subject to such liabilities as are expressly provided by statute. (Cases.) Likewise, it is also well settled that the law in force at the time the bonds and coupons are issued by a district become a part of the contract. (Cases.) * * *
>
> That the registering of the bonds and coupons, as provided by Sec. 52, supra, constituted a new agreement and tolled the statute of limitations until there was sufficient money in the hands of the treasury of the district with which to pay the

same, and notice given as provided by the California Irrigation District Act, is upheld by the United States Supreme Court in the case of *County of Lincoln v. Luning,* 130 U. S. 529, 33 L. ed. 766. The opinion in this case, after holding that a transaction similar to that which took place between the plaintiff and the district constituted the creation of a new agreement, used the following language: 'The cases of *Underhill v. Sonora,* 17 Cal. 172 and *Freeman v. Chamberlain,* 65 Cal. 603, are in point.' * * *

We also hold that the statute of limitations in this case is *tolled and can not be pleaded* by the district as a defense until the statutory period elapses after funds are in the hands of the treasurer *with which to make payment, and notice thereof given."* (Emphasis supplied.)

Moody v. Provident I. D., 12 Cal. (2d) 389.

Instead of obeying the Constitution and laws of California, appellee has illegally since 1933 paid all except the holders of "still outstanding" bonds the full amount of money claimed and demanded, while the appellant's duly presented coupons lawfully payable in 1933 and semi-annually thereafter, and the principal due on bonds owned by appellant have been defaulted, and nothing at all has been paid to appellant during all these 14 years. This discriminatory misconduct by appellee is in violation of the law applicable, and governing its affairs as construed and applied also in the following cases:

Bates v. McHenry, 123 Cal. App. 81;

Shouse v. Quinley, 3 Cal. (2d) 357;

Provident v. Zumwalt, 12 Cal. (2d) 365;
El Camino v. El Camino, 12 Cal. (2d) 378.

In *Fontana Land Co. v. Laughlin,* 199 Cal. 625, 636, the Court said:

> "The power to nullify acts of the legislature prescribing a limitation upon the time within which actions may be commenced is not a judicial prerogative. Statutes of limitations become rules of property."

It is respectfully submitted that the power to prescribe a limitation upon the time within which actions may be commenced, where there is no statute of limitations "applicable to the still outstanding obligations", is equally not a judicial prerogative, and the Congress has not delegated any authority to its Courts to supply a statute of limitations under any statute or decision cited by appellee.

In *Moody v. Provident I. D.,* 12 Cal. (2d) 389, the Court further said:

> "It is further contended by the respondent that having the bonds and coupons registered and the district endorsement made by the treasurer as authorized by the provisions of section 52 of the California Irrigation District Act as amended in 1919, increasing the interest from 6% to 7% and specifying that the bonds and coupons should thereafter bear interest at the rate of 7 percent until funds were available for their payment, and the acceptance of the same by the plaintiff, *constituted a new agreement.* The consideration moving to the plaintiff would be the increased interest *and the waiving on the part of the dis-*

trict of the right to plead the statute of limitations, thus, in any event rendering the entering of a money judgment against the district on the bonds and coupons an unnecessary and idle procedure. * * *"

"The endorsement on the bonds and coupons by the treasurer of the district binds the district to pay that (7%) rate of interest *whenever* funds are available for such purpose. Thus, the financial interests of the plaintiff are rendered *exactly the same by the endorsement as it would be after obtaining a money judgment."* (Emphasis ours.)

The Supreme Court of California has clearly and unequivocally decided that the applicable State law does not allow appellee to plead the statute of limitations as against the "still outstanding" past due bonds and coupons owned by appellant, all of which were duly presented for payment according to controlling State law.

The decree of the District Court, that the statute of limitations "applicable to the still outstanding" bonds and coupons has run, is an error of law, because it contravenes the decision of the Supreme Court of California, in the cases cited.

2. THE DISTRICT COURT, AFTER THE FINAL DECREE HAD BECOME FINAL, IS NOT AUTHORIZED TO MAKE ADDITIONS TO ITS SUBSTANTIVE PROVISIONS.

The final decree under 11 U.S.C.A. 401-403 was signed and filed July 15, 1941. It became final November 9, 1942. (R. 26.)

However much appellee may now wish that the claim of appellant had not been separately dealt with in that decree which expressly recognizes it as a "still outstanding obligation", until the statute of limitations "applicable", if any, has run, it is now too late to vary the force and effect of the final decree, which is final and conclusive of the proceeding under 11 U.S.C.A. 401-403. Appellee is not now in position to complain of the clear provisions in the final decree, at least not without a showing of injustice or hardship. There is no showing of injury to appellee or even the hint of it anywhere in the record.

The final decree, discharge and order settling report and account of disbursing agent (R. 26) does not cancel and annul the "still outstanding obligations", but expressly excepts them from the language embodied in paragraph 3 of the decree, while paragraph 2 provides as follows:

> "If any money shall remain in the hands of the Registrar *after* petitioner claims that *the statute of limitations applicable to its still outstanding obligations, if any, has run,* petitioner may so report to this Court for such further action respecting said money remaining in the hands of the Registrar as this Court may determine to be proper and for the final closing of the proceeding." (Emphasis ours.)

In this action, appellee has pointed to no case supporting his argument. (R. 129.) Neither has he suggested that the cases cited by appellant are not completely controlling of the disputed point, and the District Court sustained the objections filed, in its order of November 15, 1946, when the Court said: "it is ordered that the petition herein is denied;" (R. 57). Because of certain conditions included in that proposed order (R. 58), objected to by appellant (R. 59) that order was not signed.

In the minute order of December 28, 1946 (R. 74) the Court did not show any statute of limitations "applicable to the still outstanding obligations", that has run, but rules that it has run and also rests its decision on "laches", and "that there has also been sufficient time under any applicable statute of limitations for the determination of the amount remaining in this fund". (R. 196.)

Therefore, because it was shown that no statute of limitations is applicable to the obligations owned by appellant, the Court appears to rule that some unshown statute applicable to the funds in the Registry of the Court has run, which materially varies the final decree. (R. 26.)

The final decree which was signed July 15, 1941 (R. 26) contains provisions and conditions in paragraph 2, making it very different from the conditions in the final decree first proposed, but not signed. (R. 21.)

It is now too late for appellee to wish that the final decree first proposed had been the final decree signed and filed.

The final decree contained no condition about a statute applicable to the funds in the Registry of the Court, but only to the statute, if any, "applicable to still outstanding" bonds and coupons of Merced Irrigation District.

The Supreme Court of California has settled that no statute of limitations is applicable to any bonds or coupons such as are owned by appellant. *Moody v. Provident I. D.,* supra.

No statute of limitations applicable to the funds in the Registry of the District Court was shown. None appears in the record. (R. 128.)

The decree of December 31, 1946 (R. 95) holding that "all claims of whatsoever nature based thereon, are now barred by the statute of limitation applicable thereto and do not now constitute valid claims against said debtor nor against said fund deposited by debtor with this Court" is arbitrary, capricious and an error of law, and it is also objected to as a variation and revision of the final decree of November 15, 1941, which became final and conclusive, November 9, 1942.

> "Whatever was before the court and is disposed of is considered as finally settled. The inferior court is bound by the decree as the law of the case and must carry it into execution *according to the mandate.* They can not vary it or examine it for any other purpose than execution;

or give any other or further relief; nor review it upon the matter decided on appeal, for error apparent, nor intermeddle with it further than to settle so much as has been remanded." (Emphasis ours.)

Ex parte Sibbald v. United States, 12 Pet. 488, 492.

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3. THE DOCTRINE OF LACHES IS INAPPLICABLE IN THE ABSENCE OF ANY SHOWING OF INJURY.

The District Court erred in finding appellant guilty of laches, in its decree of December 31, 1946 (R. 95, 96), when it said:

> "* * * that the owners and/or holders of said outstanding bonds and/or coupons are guilty of laches in the premises and are barred thereby and by applicable statutes of limitation from receiving any part of said fund on deposit herein and/or from asserting any claim whatsoever against said debtor based on said bonds and/or coupons."

No applicable statute, federal or state is shown to warrant this order.

Title 28 of the Judicial Code, Secs. 851, 852, appears to govern the disbursement of, and the rights of creditors to present claims to funds such as those in the Registry of the Court in this case. No time limit whatever is provided in the Code within which lawful claims to such a fund may be presented.

> "Lapse of time alone does not constitute laches, and delay will not bar relief where it has not

worked injury, prejudice, or disadvantage to defendants or others adversely interested."

Shell v. Strong, 151 Fed. (2d) 909, C.C.A. 10.

"As we understand, the courts generally enforce the rule that a plaintiff does not lose his remedy by mere laches, unless by delay his legal rights are also lost and the defendant acquires by prescription a right to commit the nuisance."

Anderson v. Town of Waynesville, 203 N. C. 37.

"Rights of creditors in fund are tolled, not by lapse of time but by distribution in accordance with statute."

In re Van Schaick, 69 F. Supp. 764.

"A surplus of funds in custodia legis, arising after payment of principal claims in a bankruptcy, * * * may be devoted to payment of interest on such claims."

Kiyoichi Fujikawa v. Sunrise Soda Water, 158 F. (2d) 490, C.C.A. 9.

The law governing escheat of other funds in *custodia legis* is reviewed at length by the Fifth Circuit Court of Appeals in the case of *Louisville & R.R. Co. v. Robins,* 135 F. (2d) 704.

It is significant that the Congress inserted no such limitations in Chap. IX (11 U.S.C.A. 401-403) as are provided in other chapters of the Bankruptcy Act.

No showing or even claim of injury by appellee or anybody else appears in the record, and the judgment that appellant is guilty of laches, is an error of law.

4. THE DISTRICT COURT ERRED IN ORDERING THE FUNDS PLACED IN THE REGISTRY OF THE COURT TO PAY "THE HOLDERS OF SUCH BONDS IN ACCORDANCE WITH SAID INTERLOCUTORY DECREE", GIVEN TO THE BANKRUPT UNLESS WITHDRAWN WITHIN 45 DAYS.

The funds in the Registry of the Court do not, under any circumstances belong to Merced Irrigation District, which never had any pecuniary right to them.

The District is merely a statutory public trust, all funds, land and property under its control being dedicated a public trust owned by the State of California. This was settled in *El Camino v. El Camino,* 12 Cal. (2d) 378.

There is no proof, or even any showing in the record that appellee ever has had any lawful right, title or interest in or to this money.

In the case of *Compton-Delevan I. D. v. Bekins,* 150 F. (2d) 526, it was held by this Court, that funds similarly in *custodia legis* do not belong to a California Irrigation District even when unclaimed within the time allowed by a decree. Certiorari was denied by the United States Supreme Court in that case.

In the case of *United States v. Greer Dr. Dist.,* 121 Fed. (2d) 675, it was held that disputed funds are "not that of the District, but of the bondholders, the District being as to it (the fund) but a trustee for them."

There are reasons, believed by appellant to be good and sufficient to justify him in taking the loss of interest he has suffered by leaving this money in *custodia legis.* The final decree (R. 26) provided explicitly

that the funds would remain in *custodia legis* until the statute of limitations "applicable to the still outstanding obligations" had run.

The rights of bondholders construed in *Nevada Nat. Bank v. Sup.,* 5 Cal. App. 638, are not covered by the plan of composition filed by Merced Irrigation District, nor by the interlocutory or final decrees entered by the District Court. For this, and other good reasons, appellant has been unwilling to give up his bonds for the money in *custodia legis* which is only part of the money his bonds entitle him to, according to Stat. 1943, Ch. 368, Secs. 26500-26553.

The decree of December 31, 1946 giving these funds to appellee unless withdrawn without objection in 45 days, is a variation and modification of the final decree.

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5. **THE DISTRICT COURT ERRED IN ENTERING THE ORDER, BECAUSE IT HAS THE EFFECT OF UNLAWFULLY GIVING ABATEMENT FROM MANDATORY TAXATION TO PRIVATE HOLDERS OF TAXABLE LAND TITLES, AND OF ALLOWING THEM TO RETAIN THE LAND TITLES IN VIOLATION OF LAW AND DECISIONS OF THE HIGHEST STATE COURT, AND THE SUPREME COURT OF THE U. S.**

The decree of December 31, 1946 (R. 96) which says that the holders of "all outstanding bonds and coupons" are "barred * * * from asserting any claim whatsoever against said debtor based on said bonds and/or coupons", if allowed by this Court, would have the force and effect of "interfering" with obligations not created by private contract or stipulation,

but which are incidents by law, established by the legislature and by the highest Court of the State. The encumbrance should be accorded at least as much dignity and importance as a like burden imposed on the land by the parties by covenant. *U. S. v. Aho,* 68 F. Supp. 358.

The statutes of California expressly provide that all lands in the district are dedicated a public trust for the "uses and purposes" of the Act, and that all land shall be and remain liable to be assessed, among other things, to pay principal and interest on all bonds. *Provident v. Zumwalt,* 12 Cal. (2d) 365.

It was intended that this would create an irrevocable and paramount obligation upon all land in the district, and its "rent, issues and profits", in order to insure repayment of lawfully issued bonds. There is no provision for the release of any land from the encumbrances so created by law. Only after all outstanding bonds and costs have been paid, or provision is made for their payment in full, can a District be dissolved. *Happy Valley Water Co. v. Thornton,* 1 Cal. (2d) 325, Stat. 1903, p. 3; Stat. 1915, p. 859; Stat. 1919, p. 751, amended, Stat. 1925, p. 220.

The law of California, by statute and decision, has created an encumbrance on all land in Merced Irrigation District which holds the land itself for future assessments, and which specifically places the land under the charge to be made from year to year, as required by law. *Provident v. Zumwalt,* supra.

Nothing in Chapter IX authorizes the District Court to make orders which contravene the limitations in Sec.

64a of the Bankruptcy Act, or in 28 U.S.C.A. § 41(1), sub. (3)(4); 28 U.S.C.A. § 379; 11 *Am. Jur.* Conflict of Laws § 30.

This restraint on appellant violates his vested property rights, as a holder of "still outstanding obligations", and is an error of law.

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6. **THE DISTRICT COURT ERRED IN FAILING TO LIFT THE RESTRAINT IN THE FINAL DECREE, WHICH RESTRAINT HAS THE FORCE AND EFFECT OF PERMITTING PUBLIC TAX OFFICIALS OF CALIFORNIA TO VIOLATE THE CONSTITUTION AND LAWS OF CALIFORNIA APPLICABLE, IN THAT IT SERVES TO RELEASE THEM FROM THE PERFORMANCE OF STATUTORY TAXING DUTIES, AS CONSTRUED BY THE HIGHEST COURTS.**

The original Chapter IX (11 U.S.C.A. 301-304) held unconstitutional in *Ashton v. Cameron County,* 298 U. S. 513, provided that, even in the interlocutory decree, the Court could make the plan of composition binding on the debtor, but the amended Chapter IX has no such provision.

No restraint is authorized except upon the filing of the interlocutory decree under 11 U.S.C.A. 401-403.

The point which distinguishes this case from all others, is the provision in this final decree which segregates the bonds owned by appellant, and certain others, and which designates them as constituting "still outstanding obligations". Manifestly a decree can not both cancel an obligation, and also recognize it as a "still outstanding obligation" at the same time. Either the bonds owned by appellant are "still out-

standing obligations", as designated in paragraph 2 of the final decree (R. 27), or else they are among those bonds "cancelled and annulled" in paragraph 3 of that final decree. If appellant's bonds now belong in the latter category, no restraint was needed in the final decree, while if "the statute of limitations applicable to the still outstanding obligations" has not run, the restraint violates 11 U.S.C.A. 403(c), sub. (a); 403 (e) sub. (6); 403 (i) because it has the force and effect of "interfering" with the execution of mandatory State land tenure and tax laws, as construed and applied repeatedly by the Courts in the following cases:

Fallbrook I. D. v. Bradley, 164 U.S. 112;
Herring v. Modesto I. D., 95 F. 705;
Shouse v. Quinley, 3 Cal. (2d) 357;
Selby v. Oakdale I. D., 140 C. A. 171;
Provident v. Zumwalt, 12 Cal. (2d) 365;
Moody v. Provident, 12 Cal. (2d) 389.

The Supreme Judicial Council of Massachusets, in the recent case of *Commissioner of Corporations and Taxation,* 54 N.E. (2d) 43 said:

> "Decision of the U. S. Supreme Court, in construing a federal statute was entitled to due deference and respect but was not binding on Supreme Judicial Court in construing Massachusetts Taxing Statutes."

See also:

Comm. v. Skaggs, 122 Fed. (2d) 721, C.C.A. 5.

In *Gardner v. State of N. J.,* decided January 20, 1947 (15 L. W. 4171) by the United States Supreme

Court, that Court again reaffirmed that obligations supported by the sovereign taxing power of a State, are still beyond the power of the bankruptcy clause to disallow. The Court said:

> "Nor do we intimate any view on the amount of the tax claim which should be allowed, or on the validity, character, priority or extent of the lien asserted by New Jersey, or on the manner in which it should be satisfied in a plan of reorganization. We only hold that the reorganization court could properly entertain all objections to the claim, except those involving the valuations underlying the assessments and the validity of those assessments. * * * Res judicata may have made binding on the Reorganization Court various questions of local law, including the amount and validity of taxes under New Jersey law and the character and extent of the lien that law affords them."

At no stage of the proceedings under Chapter IX, or here, has there been any objection "involving the valuations underlying the assessments or the validity of those assessments", against which assessments appellant's bonds are a fixed claim, ranking ahead of other real property liens public or private according to law. The priority of this lien was recently construed by this Honorable Court in *Fallbrook v. Cowan,* 131 F. (2d) 513, C.C.A. 9 (certiorari denied).

No objection to the claim of appellant upon the assessments appears anywhere in the record of this case, or in any stage of the Chapter IX proceeding.

Squarely in point appears to be the case of *Gompers v. Buck's Stove & Range Co.,* 221 U.S. 418, 436, where the Court said:

"a restraining order issued by a court having no jurisdiction under the applicable statute or the Constitution is void ab initio and, therefore no contempt proceeding can be maintained for any disobedience of its provisions."

"Courts can not usurp the functions of the legislature, nor read into a statute something which they may conceive to have been unintentionally left out by the legislative body."

State v. Reeves, 129 Pac. (2d) 805.

"No mere omission nor mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to language of the statute."

Porter v. Novak, 157 F. (2d) 824. C.C.A. Mass.

"Generally, effect of bankrupt's discharge on particular debt is determined in plenary action brought in court other than bankruptcy court by creditor to enforce debt against discharged bankrupt, and an essential part of trial of such action is a determination of effect of discharge when pleaded by bankrupt as an affirmative defense. Federal Rules of Procedure, rule 8(c), 28 USCA following sec. 723 c; Bktcy Act, §§ 14, 17, 11 USCA §§ 32, 35."

In re Anthony, 42 F. Supp. 312.

"Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure

full federal authority, completely displacing the States."

Hill v. Florida, 325 U.S. 538.

"It is submitted * * * that the right of the holders of municipal and quasi-municipal bonds to compel the exercise of the taxing power for the satisfaction of their claim is at least as definitely a property right as are the rights of mortgagees."

1 Jones, Bonds and Bond Securities, (4 Ed.) Sec. 480.

Louisiana v. New Orleans, 215 U.S. 170;
Ex parte Ayers, 123 U.S. 443;
Cargile v. N.Y. Tr. Co., 67 F. (2d) 585;
Huddleson v. Dwyer, 322 U.S. 232;
Fallbrook I. D. v. Bradley, 164 U.S. 112;
Snowden v. Hughes, 321 U.S. 1.

The restraint in the decree as applied, is inconsistent with the inhibition in 11 U.S.C.A. 403(c), sub. (a); 403(e) sub. (6); 403(i). Nothing contained in Chapter IX or any chapter of the Bankruptcy Act authorizes a federal Court to shield State tax officials who have violated the Constitution and mandatory provisions of the land tax laws of their sovereign State, as construed by the State Court. The restraint here complained of will, if not stricken as prayed herein, allow both tax collectors and tax evading landholders to violate the law, and escape the penalties required by governing law.

7. **APPELLANT IS A HOLDER OF VALID, BINDING AND UNPAID ORIGINAL "STILL OUTSTANDING" BONDS AND COUPONS WHOSE VESTED RIGHTS ARE GOVERNED BY STATE LAW, AND ARE SECURED AGAINST IMPAIRMENT BY ART. I, SEC. 10, CL. I AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION.**

> "Denial of certiorari by U. S. Supreme Court has no precedential significance."
>
> *In re Luma Camera Service,* 157 F. (2d) 951, C.C.A. 2.

Since the *U. S. v. Bekins,* 304 U. S. 27, case, the Supreme Court of the United States has re-affirmed in numerous cases, the latest being *U. S. v. Carmack,* 67 S. Ct. 252 at page 255, that neither State consent nor submission can enlarge the powers of Congress. This basic question was not before the Court in the *Bekins* case, supra, as an actual controversy, and the Court did not, therefore, rule upon it, saying merely:

> "It is unnecessary to consider the question whether Chapter X (now IX, Act of Aug. 16, 1937, as amended), would be valid as applied to the irrigation district in the absence of the consent of the State which created it * * *".
>
> *U. S. v. Bekins,* 304 U. S. 27.

In *Kohl v. U. S.,* 91 U. S. 371, cited with approval in the *Carmack* case, supra, the Court said:

> "If the U. S. have the power it must be complete in itself. It can neither be enlarged or diminished by a State * * * The consent of a State can never be a condition precedent to its enjoyment."

Nothing in the California laws upon which the bonds at bar are based authorizes any federal interference whatever with the orderly execution of the law governing appellee, by an Act of the Congress.

The Supreme Court has never reversed the following principle of law, as affirmed in *Louisiana v. New Orleans,* 215 U. S. 170:

> "The legislature of a State can not take away rights created by former legislation for the security of debts owing by a municipality of the State or postpone indefinitely the payment of lawful claims until such time as the municipality is ready to pay them."

The State, when it has exercised its sovereign power to tax the value of privately held land, is constitutionally immune from federal intervention.

Cargile v. N. Y. Trust Co., 67 F. (2d) 585,

and

Ex parte Ayers, 123 U. S. 443.

Stat. 1939, Ch. 72, being the supposed "consent" by California to the federal bankruptcy statute (Ch. IX) retrospectively takes away vested rights of appellant created by former legislation. The bonds at bar have been issued under laws existing since long before 1939. Such State laws cannot be applied retrospectively.

Shouse v. Quinley, 3 Cal. (2d) 357.

The bonds at bar are statutory claims against land rent assessments, to be levied and collected as required by law, and their inviolability has been construed over and over by the highest Courts, both federal and state.

The taxes, based on the assessments to pay bonds and coupons can not be levied until the year before the bonds and coupons fall due. Nothing in Ch. IX makes an exception to the rule declared in *Ex parte Williams,* 227 U. S. 267, as follows:

> "Assessments become reviewable judicially only when they are translated into action, as by a levy of a tax based on the assessment."

This principle of immunity was again re-affirmed in *Gardner v. State of N. J.,* decided January 20, 1947, by the United States Supreme Court (15 U. S. L. W. 4171), in a composition case, arising under the Bankruptcy Act.

In the *U. S. v. Bekins* case, supra, the Court further said:

> "It should be observed that Sec. 83 e (403-e) provides as a condition of confirmation of a plan of composition that it must appear that the petitioner 'is authorized by law to take all action necessary to be taken by it to carry out the plan' * * *
>
> The phrase 'authorized by law' manifestly refers to the law of the State."

There is nothing in the State law which allows appellee to fail, refuse or neglect to levy and collect the assessments as required by applicable State law, or which authorizes any Court directly or indirectly to temper the mandatory provisions in respect of levying and collecting the land taxes, in the manner and at the times required by the applicable State laws, as construed in *Provident v. Zumwalt,* 12 Cal. (2d) 365,

which decision is still controlling over the duties of appellee. It is significant that this sweeping decision came down 6 months after the *Bekins* case was announced, and it should be read with that fact kept in mind.

Any attempt to enter judicial orders adverse to taxpayers, is quickly disapproved, as in *Keane v. Strodtman,* 18 S. W. (2d) 898 (Mo.).

Can the vested rights of investors in lawful State and local tax secured bonds now be made inferior to those of tax evading private land holders by judicial decree?

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and can not be enforced."
>
> *Linder v. United States,* 268 U. S. 5, 17.

> "The Supreme Court has warned many times, that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though full compensation be paid."
>
> *Rindge Co. v. Los Angeles County,* 262 U. S. 700, 705.

If it appears not too late to modify the final decree of 1941, it is submitted that it should be reversed and the restraint lifted, in order that appellant may again have recourse to the California Court to seek an order to compel the responsible officials to cease and desist their long and flagrant violation of the applicable land tax laws of the Sovereign State of California, as construed by the highest State Courts.

Honorable Robert H. Jackson, as Solicitor General of the United States filed a brief in the *Bekins* case, supra, in which he stated to the Court:

> "The taxing agency, of course, is subject to the full control of the State, and its powers are only those granted by the State. Unless those powers, expressly or by implication, include authority to compose its debts and to invoke the jurisdiction of the bankruptcy court, the taxing agency can not seek the benefit of the Act of August 16, 1937. Not only, therefore, is the choice of the taxing agency wholly voluntary, but * * * it must necessarily be made subject to the provisions of the State law. Even after the taxing agency has itself invoked the bankruptcy jurisdiction, the court is without any control over its fiscal affairs or governmental activities."

In *El Camino v. El Camino,* 12 Cal. (2d) 378, the Court held squarely that all the fiscal and other affairs of a California Irrigation District are "governmental functions exclusively".

In *Providence Bank v. Billings,* 4 Pet. 514 at p. 560, it was said:

> "There are certain powers which are inherent in the people and can not be alienated, even by the people themselves, much less by their representatives to whom the powers are entrusted for a time; not to be subjected to interference by any other Sovereignty * * *"

The sovereign power of a State to borrow money upon the rent of land within its dominion free from federal intervention was debated at length in *The Federalist,* Essays Nos. XII, XXX to XXXVI. In Essay XXXII, Hamilton said:

> "* * * I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (with the sole exception of duties or imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution."

There is no proof anywhere in the record that appellee is entitled to violate the law, or that the vested property rights of appellant, secured by Art. I, Sec. 10, Cl. I and the 5th and 14th Amendments to the United States Constitution are not violated by the District Court decree. The cases cited by appellant completely support his objections and claim, and no question of its validity appears.

CONCLUSION.

The "still outstanding obligations" of Merced Irrigation District owned by appellant are obligations of "a State or any political subdivision thereof" within the meaning of the statutory exemption in the successive Revenue and Bankruptcy Acts, including 11 U.S.C.A. 401-403. (72 Op. Att. Gen. 38, Feb. 4, 1937.)

The Constitutional immunity from federal intervention of such fiscal affairs of a sovereign State is long and thoroughly settled, and the importance of its original formulation is more visible at home and abroad than ever before.

We have shown that the restraint in the final decree, and in the decree of December 31, 1946, if it stand, would have the force and effect of allowing tax evading and tax avoiding private holders of land to escape payment of the land debt as fixed and required by the governing law, and to retain privately held titles to land within the dominion of the State, in absolute violation of controlling State law and decisions. Also, that such restraint deprives appellant of vested property rights fixed by State law and secured by the Constitution of the United States.

No Act of Congress or of California has repealed or amended the statute which imposes upon appellee the continuing duty to levy and collect the unlimited advalorem land assessments, and ground rent as long as is necessary to fully pay the bonds and interest claim owned by appellant. There is no suggestion that any competing claim to the rent of the land in Merced Ir-

rigation District is paramount to the claim of appellant, or that any competing claim exists at all.

No statute of limitations applicable to the "still outstanding obligations" is shown, and appellee claims no injury or hardship by reason of the fact that the $32,811.95 is still in *custodia legis,* and has shown no right, title or interest in or to that fund.

Wherefore, appellant respectfully submits that the decree of the District Court be set aside as without warrant of law, and that this Honorable Court reaffirm the Constitutional immunity from Federal intervention of the still outstanding obligations owned by appellant under the successive Revenue and Bankruptcy Acts, including 11 U.S.C.A. 401-403.

Dated, San Francisco,
July 25, 1947.

J. R. Mason,
Appellant Pro Se.